STATE OF MICHIGAN

COURT OF APPEALS

DAVID DWAYNE EVANS,

Plaintiff-Appellant,

v

LOREN M. DICKSTEIN, Individually, and LEWIS & DICKSTEIN, P.L.L.C.,

Defendants-Appellees.

UNPUBLISHED
May 17, 2005

No. 252791
Oakland Circuit Court
LC No. 2003-047315-NM

Before: Griffin, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendants and dismissal of his complaint for failure to provide expert testimony in this legal malpractice action. We affirm.

Plaintiff contends the trial court erred in granting defendants' motion for summary disposition based on plaintiff's failure to present expert testimony to establish his claim of legal malpractice. This Court reviews de novo the grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7), this Court accepts all well pleaded allegations as true, unless they are contradicted by other evidence, and construes them in favor of the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone and may not be supported by documentary evidence. *Maiden, supra* at 119. The motion must be granted if no further factual development would justify a plaintiff's claim for relief. *Id.*

"As a general principle, an attorney must bring to bear the skill, learning, and ability of the average practitioner of law when conducting legal business for a client. He or she must exercise ordinary care or diligence in the prosecution of the client's interests." *Joos v Auto-Owners Ins Co*, 94 Mich App 419, 422; 288 NW2d 443 (1979). To establish legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of the injury; and (4) the fact and extent of the injury alleged. *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001). For a legal malpractice claim, a petitioner must demonstrate that, but for the

attorney's alleged malpractice, he or she would have been successful in the underlying action. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996).

Plaintiff implies that defendants' submission of a defective brief and failure to conform to time limitations in the filing of plaintiff's appellate brief is sufficient evidence of a breach of duty to substantiate his claim of malpractice and avoid the necessity of providing expert testimony. However, expert testimony is typically required in a legal malpractice action to establish the requisite standard of conduct and breach of conduct, absent a matter so manifest that an ordinary person or layman would be capable of determining the carelessness of defendants. *Law Offices of Lawrence J Stockler PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). This Court has previously rejected the argument that violation of the Rules of Professional Conduct is negligence per se. Instead, this Court has favored the proposition that a violation of the Rules of Professional Conduct is rebuttable evidence of malpractice and does not relieve a plaintiff "of the obligation to present expert testimony." *Beattie v Firnschild*, 152 Mich App 785, 792-793; 394 NW2d 107 (1986).

More importantly, "[i]n a legal malpractice action, the plaintiff has the burden of showing that 'but for the attorney's alleged malpractice, he would have been successful in the underlying suit.'" *Colbert v Conybeare Law Office*, 239 Mich App 608, 619-620; 609 NW2d 208 (2000) (citation omitted); see also *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). This "suit within a suit" analysis has been found applicable where the alleged negligent conduct pertained to the failure of an attorney to properly pursue an appeal. *Id.* at 587. A plaintiff in a legal malpractice action asserting negligence in an appeal must prove two aspects of causation in fact: "whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation." *Id.* at 588. The question of whether an underlying appeal would have been successful is reserved to the court "because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary." *Id.* at 608. Plaintiff confuses the ability and role of the court to determine the viability and potential of plaintiff to prevail on appeal from the necessity of expert testimony to establish that the allegedly deficient performance of the attorney failed to meet the requisite standard of care.

Defendants' dilatory filing of plaintiff's brief and the waiver of certain arguments pertaining to the admissibility of his minor child's testimony in the underlying parental rights termination case, standing alone, do not establish legal malpractice. On appeal, this Court addressed the admissibility of the minor child's statements pursuant to MRE 601 and determined the trustworthiness of the child's statements. This Court found sufficient evidence to affirm the trial court's determination that a statutory basis for termination of parental rights existed and that termination was not against the best interests of the children.

Plaintiff asserts that defendants were negligent in failing to raise as an issue on appeal the ineffectiveness of his trial counsel. However, an appellate attorney's decision pertaining to which issues to raise is a matter of judgment and generally does not comprise grounds for claiming malpractice if the attorney acts in good faith and exercises reasonable care. *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). An appellate attorney is not required to raise every claim of arguable legal merit in order to be an effective counsel. *People v Reed*, 449 Mich 375, 381-382; 535 NW2d 496 (1995).

Plaintiff also asserts that defendants' failure to timely file his appellate brief constitutes malpractice. However, defendants' failure to meet the filing requirements resulted only in the loss of oral argument, MCR 7.212(A)(4) and MCR 7.214(A). Plaintiff did not lose his right to have his appeal heard or decided by an appellate tribunal. In fact, plaintiff's appeal was fully considered by this Court. Plaintiff has not alleged or provided any facts to support a conclusion that the outcome of his appeal would have been different had oral argument been preserved.

In *Paul v Lee*, 455 Mich 204, 211-212; 568 NW2d 510 (1997), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), the Michigan Supreme Court determined that, in claims of professional malpractice, a plaintiff's assertion that a professional breached the applicable standard of care must generally be supported by expert testimony. Cases necessitating expert testimony involve matters of special knowledge strictly involving professional skill that would not ordinarily be known or in the province of a layperson. *Id.* This is a consideration separate and distinct from a determination regarding the viability of plaintiff's appeal. As such, the trial court did not err when it concluded that expert testimony would be required to establish a prima facie case of legal malpractice under the factual circumstances presented.

Plaintiff's final issue on appeal is whether the trial court erred in refusing to subpoena the judges listed as experts on his witness list and striking the named judges from his expert witness list, when plaintiff could not provide verification of the willingness of the referenced judges to voluntarily testify on plaintiff's behalf. This Court reviews a trial court's decision to strike an expert witness for an abuse of discretion. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 412; 516 NW2d 502 (1994). A trial court abuses its discretion in an evidentiary matter when its ruling has no basis in law or fact. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411; 443 NW2d 340 (1989).

Plaintiff urges that the trial court erred in refusing to compel the testimony of judges as expert witnesses on plaintiff's behalf and in striking their names as experts from his witness list, resulting in the dismissal of his complaint for failure to establish the requisite standard of conduct for legal malpractice through expert opinion. Contrary to plaintiff's arguments, the trial court did not frustrate or prevent plaintiff's ability to establish his claim of legal malpractice. The trial court consistently instructed plaintiff to seek alternative experts on this issue and indicated its willingness to permit the cited judges to testify, if their testimony was shown by plaintiff to be voluntarily procured. It is important to note that plaintiff did not indicate an intention to call the trial court judges who had presided over his civil and criminal hearings, or the appellate judges, as fact witnesses to offer testimony pertaining to actions or deficiencies directly observed in the conduct of plaintiff's various trials and appeal. Rather, plaintiff specifically identified the judges as experts pertaining to whether defendants' actions or deficiencies in performance constituted legal malpractice.

Justification for the trial court's refusal to permit the issuance of subpoenas to compel the testimony of the referenced judges as experts is contained in MRE 706. In accordance with that rule of evidence regarding the appointment of experts by a trial court, the rule specifically provides, in relevant part, that:

> [t]he court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. [MRE 706(a).]

The applicable rule of evidence contemplates expert testimony as being voluntary. Specifically, the Michigan Supreme Court distinguished a fact witness from an expert witness by defining an expert witness as not being "a person 'having knowledge of relevant facts,'" but rather one who gives "opinion testimony" which could not "be secured by means of a subpoena." *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970). The trial court was correct in both refusing to subpoena, or in any manner compelling, the judges listed by plaintiff to testify as expert witnesses and in striking them from plaintiff's witness list when he failed to secure verification they would voluntarily provide testimony on plaintiff's behalf.

Affirmed.

/s/ Richard Allen Griffin
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood